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7 SEKOU KWANE THOMPSON,
8 Plaintiff,
9 v.
10 KATHLEEN ALLISON, et al.,
11 Defendants.

Case No. [23-cv-05079-HSG](#)

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**ORDER GRANTING MOTION FOR
JUDGMENT ON THE PLEADINGS;
DENYING AS MOOT REQUEST TO
STAY DISCOVERY; DENYING LEAVE
TO FILE THIRD AMENDED
COMPLAINT**

Re: Dkt. Nos. 29, 30

Plaintiff, an incarcerated person housed at Correctional Training Facility (“CTF”), has filed a *pro se* civil rights action, alleging that CTF correctional officers Martin Magana, Oliva Castro, Don Zypel Igacio, A. Pelayo, Oscar Covarrubias, Jo-ann Crews, and Michael Hicks were deliberately indifferent to his safety when they knowingly housed him with a known violent prisoner. Dkt. Nos. 20, 21. This order addresses: (1) Defendants’ motion for judgment on the pleadings for failure to exhaust administrative remedies, Dkt. No. 29, and related request for judicial notice, Dkt. No. 29-1; (2) Defendants’ request to stay merits-based discovery pending resolution of the motion for judgment on the pleadings, Dkt. No. 30; and (3) Plaintiff’s request for leave to file a third amended complaint, Dkt. No. 31 at 2.

BACKGROUND

I. Operative Complaint (Dkt. No. 20)

In the operative complaint, Plaintiff makes the following relevant allegations. On October 4, 2021, defendants Magana, Ignacio, and Castro put in a bed request for inmate Bankhead to be housed in Plaintiff’s cell; defendant Pelayo accepted the request; defendants Covarrubias and Hicks reviewed the request; and defendant Crews approved the bed assignment. Plaintiff is in a

1 level I cell. Inmate Bankhead is a known violent Level II prisoner. Placing inmate Bankhead in
2 Plaintiff's cell was a violation of prison policy and procedures, which require prison officials to
3 evaluate all factors, including the inmate's history of in-cell assaults or violence, when making,
4 reviewing or approving housing requests. It was "obvious" to Defendants that inmate Bankhead
5 posed a risk to Plaintiff's safety due to inmate Bankhead's recent fight with another prisoner and
6 because inmate Bankhead was "known for fighting." On October 28, 2021, Plaintiff was violently
7 attacked and battered by inmate Bankhead. *See generally* Dkt. No. 20.

8 In the operative complaint, Plaintiff states that he exhausted administrative remedies by
9 filing Grievance No. 144510. He states that Grievance No. 144510 bypassed the first level; was
10 rejected at the second level on July 27, 2021; and was denied at the third and final level on
11 October 15, 2021. Dkt. No. 20 at 2.

12 **II. Grievance No. 144510**

13 On July 25, 2021, Plaintiff submitted Grievance No. 144510. This grievance challenged
14 the June 30, 2021 Unit Classification Committee ("UCC") decision to transfer Plaintiff to
15 Correctional Training Facility, Level II housing. The grievance stated that CTF Level II's security
16 level was inconsistent with Plaintiff's placement score and that Plaintiff's preferred action was to
17 be transferred to California Institute for Men, Level I housing, so that he could meet the Board of
18 Parole Hearing ("BPH")'s recommendation that he participate in a vocational program,
19 specifically underwater welding. The grievance further stated that, alternatively, Plaintiff sought
20 to be placed at Sierra Conservation Center. The grievance argued that these placements would be
21 consistent with the CDCR's programming and needs and Plaintiff's placement score, and allow
22 for safety and security. The grievance requested that the following actions be taken: that Plaintiff
23 be housed at either CIM Level I or Sierra Conservation Center; that Captain Ortega be
24 reprimanded and retrained regarding the CDCR's missions; and that Plaintiff be compensated for
25 any future harm he might suffer as a result of the UCC's "invalid recommendation and/or action."
26 Dkt. No. 29-3 at 1-5.

27 On July 27, 2021, CTF's Office of Grievances acknowledged receipt of Grievance No.
28 144510 and rejected the grievance as anticipatory:

1 Your claim concerning Offender Classification; Issue Arising from a UCC, ICC or DRB
2 that is NOS is being rejected by Office of Grievances for the reason(s) indicated below:

3 Your claim concerns an anticipated policy, decision, action, condition or omission by the
4 Department or departmental staff, generally meaning the action has not happened yet.
Once a decision or action has taken place and if you are still dissatisfied, you may file a
new grievance.

5 Your claim regarding Unit Classification Committee (UCC)/Institution Classification
6 Committee (ICC) Action initiated 6/28/21, in which committee recommended you be
transferred was reviewed and deemed to be meet [sic] rejection criteria as your Claim
7 concerns an anticipated policy, decision, action, condition, or omission pursuant to Title
8 15, Section 3487(a)(2). The transferred recommendation is pending review by the
Classification Staff Representative (CSR) at this time; therefore, the action is not yet
finalized. Once case is reviewed by the CSR, you may submit a NEW CDCR 602
grievance to the CTF Office of Grievance if you deem the issue still exists.

9 This serves as your response by the Office of Grievances. If you are dissatisfied with this
10 response, you may appeal the rejection decision to CDCR's Office of Appeals.

11 Do not resubmit this claim to the Office of Grievances at Correctional Training Facility.

12 Dkt. No. 29-4 at 2.

13 Plaintiff appealed the rejection to the Office of Appeals. Dkt. No. 29-5 at 2. On October
14 15, 2021, the Office of Appeals denied the grievance:

15 III. REASONING AND DECISION

16 The Office of Appeals concurs that the institution appropriately rejected the claim at time
of receipt. [Plaintiff] submitted Log #144510 on 7/25/2021, prior to the Classification
Services Representative's review and approval on 8/3/2021. Therefore, the claim is denied
as anticipatory. Subsequently, based upon institutional needs for compaction, [Plaintiff]
was moved to the CTF Level II Facility.

19 IV. REMEDY

20 Your claim has been denied. Therefore, there is no applicable remedy.

21 Decision: Denied

22 After a thorough review of all documents and evidence available at the time of this written
23 decision, it is the order of the Office of Appeals that this claim is denied. This decision
exhausts the administrative remedies available to the claimant within CDCR.

24 Dkt. No. 29-5 at 2. This decision identified the grievance category as "Offender Classification"
25 and the sub-category as "Issue Arising from a UCC, ICC, or DRB that is NOS."

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DISCUSSION

I. Motion for Judgment on the Pleadings

A. Legal Standard

“After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.” Fed. R. Civ. P. 12(c). Granting a judgment on the pleadings is proper when, “taking all the allegations in the pleadings as true, the moving party is entitled to judgment as a matter of law.” *Gregg v. Haw., Dep’t of Pub. Safety*, 870 F.3d 883, 887 (9th Cir. 2017) (quoting *Nelson v. City of Irvine*, 143 F.3d 1196, 1200 (9th Cir. 1998)). “Because a Rule 12(c) motion is functionally identical to a Rule 12(b)(6) motion, the same standard of review applies to motions brought under either rule.” *Id.* (quoting *Cafasso v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 n.4 (9th Cir. 2011)) (internal quotation marks omitted).

“Dismissal under Rule 12(b)(6) is appropriate only where the complaint lacks a cognizable legal theory or sufficient facts to support a cognizable legal theory.” *Mendiondo v. Centinela Hosp. Med. Ctr.*, 521 F.3d 1097, 1104 (9th Cir. 2008); *see also* Fed. R. Civ. P. 8(a) (requiring that complaint contain “short and plain statement of the claim showing that the pleader is entitled to relief”). To survive a Rule 12(b)(6) motion, a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is facially plausible when a plaintiff pleads “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In reviewing the plausibility of a complaint, courts “accept factual allegations in the complaint as true and construe the pleadings in the light most favorable to the nonmoving party.” *Manzarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1031 (9th Cir. 2008). However, a court need not accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences; or allegations that contradict matters properly subject to judicial notice. *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir. 2008). In assessing the sufficiency of the pleadings, “courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine . . . in particular, documents incorporated into the complaint by reference, and matters of which a court may take judicial

1 notice.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

2 **B. Request for Judicial Notice (Dkt. No. 29-1)**

3 **1. Legal Standard**

4 As a general rule, district courts may not consider material outside the pleadings when
5 assessing the sufficiency of a complaint under Fed. R. 12(b)(6). *Lee v. City of Los Angeles*, 250
6 F.3d 668, 688 (9th Cir. 2001). However, there are two exceptions to this rule: the incorporation-
7 by-reference doctrine and judicial notice under Fed. R. Evid. 201. *Khoja v. Orexigen*
8 *Therapeutics, Inc.*, 899 F.3d 988, 998 (9th Cir. 2018). Both of these procedures permit district
9 courts to consider materials outside a complaint without converting a motion to dismiss into a
10 summary judgment. *Id.* at 998; *see also Lee*, 250 F.3d at 688-89.

11 The incorporation by reference doctrine is a judicially created doctrine that allows a court
12 to consider certain documents as though they were part of the complaint itself. *Khoja*, 899 F.3d at
13 1002. This doctrine is to prevent a plaintiff from cherry-picking certain portions of documents
14 that support his claims, while omitting portions that weaken his claims. *Id.* Incorporation by
15 reference is appropriate “if the plaintiff refers extensively to the document or the document forms
16 the basis of plaintiff’s claim.” *Id.* at 1002. However, “the mere mention of the existence of a
17 document is insufficient to incorporate the contents” of a document. *Id.* at 1002. Under the
18 incorporation-by-reference doctrine, a court may consider evidence on which the complaint
19 “necessarily relies” if: (1) the complaint refers to the document; (2) the document is central to the
20 plaintiff’s claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6)
21 motion. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006). If these conditions are met, the
22 court may treat such a document as part of the complaint, and may assume the truth of the
23 document’s contents for purposes of a motion to dismiss under Rule 12(b)(6). *Daniels-Hall v.*
24 *Nat’l Educ. Ass’n*, 629 F.3d 992, 998 (9th Cir. 2010). However, while a court “may assume [an
25 incorporated document’s] contents are true for purposes of a motion to dismiss . . . it is improper
26 to assume the truth of an incorporated document if such assumptions only serve to dispute facts
27 stated in a well-pleaded complaint.” *Khoja*, 899 F.3d at 1002.

28 Fed. R. Evid. 201(b) permits a court to notice an adjudicative fact if it is “not subject to

1 reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction;
2 or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably
3 be questioned." Fed. R. Evid. 201(b).

4 In *Khoja*, the Ninth Circuit clarified the judicial notice rule and incorporation by reference
5 doctrine, noting that a court may take "judicial notice of matters of public record," but "cannot
6 take judicial notice of disputed facts contained in such public records." *Khoja*, 899 F.3d at 999
7 (citation and quotations omitted). The Ninth Circuit has clarified that if a court takes judicial
8 notice of a document, it must specify what facts it judicially notices from the document. *Id.* at
9 999. Further, "[j]ust because the document itself is susceptible to judicial notice does not mean
10 that every assertion of fact within that document is judicially noticeable for its truth." *Id.* As an
11 example, the Ninth Circuit held that for a transcript of a conference call, the court may take
12 judicial notice of the fact that there was a conference call on the specified date, but may not take
13 judicial notice of a fact mentioned in the transcript, because the substance "is subject to varying
14 interpretations, and there is a reasonable dispute as to what the [document] establishes." *Id.* at
15 999–1000.

16 **2. Analysis**

17 Defendants have requested that the Court take judicial notice of the existence and contents
18 of Grievance No. 144150; and the existence and contents of the denials of Grievance No. 144150
19 by the CTF Office of Grievances and by the Office of Appeals. Dkt. No. 29-1. Defendants argue
20 that judicial notice is appropriate because the existence and contents of these documents are not
21 subject to reasonable dispute; because these documents were incorporated by reference into
22 Plaintiff's complaint; and because inmate grievances are public records subject to judicial notice.
23 *Id.*

24 The Court GRANTS Defendants' request for judicial notice for the following reasons.
25 First, the operative complaint incorporates by reference Grievance No. 144150 and the subsequent
26 denials. The complaint identifies Grievance No. 144150 as the grievance that satisfied Plaintiff's
27 requirement under the Prison Litigation Reform Act ("PLRA") to exhaust administrative remedies
28 and lists the subsequent denials in the complaint. Dkt. No. 20 at 2-3. Second, Grievance No.

144150 is a record of a state agency and its existence and contents are not subject to reasonable
dispute. *See City of Sausalito v. O'Neill*, 386 F.3d 1186, 1224 n.2 (9th Cir. 2004) (“We may take
judicial notice of a record of a state agency not subject to reasonable dispute.”). Third, Plaintiff
does not dispute the existence or contents of the copy of Grievance No. 144150 and the related
denials that are attached to the request for judicial notice. *Marder*, 450 F.3d at 448. The Court
therefore takes judicial notice of (1) the existence and the contents of Grievance No. 144150; (2)
the July 27, 2021 rejection letter from Correctional Training Facility’s Office of Grievances; and
(3) the October 15, 2021 denial letter from the Office of Appeal, but does not assume the truth of
the contents of any of these documents.

C. PLRA Exhaustion Requirement

The Prison Litigation Reform Act (“PLRA”) sets forth the requirement that “[n]o action
shall be brought with respect to prison conditions under [42 U.S.C. § 1983], or any other Federal
law, by a prisoner confined in any jail, prison, or other correctional facility until such
administrative remedies as are available are exhausted.” 42 U.S.C. § 1997e(a). The PLRA’s
exhaustion requirement is mandatory. *Porter v. Nussle*, 534 U.S. 516, 524 (2002). All available
remedies must be exhausted, and those remedies “need not meet federal standards, nor must they
be ‘plain, speedy, and effective.’” *Id.*; *see also Booth v. Churner*, 532 U.S. 731, 739-41 & n.5
(2001). Section 1997e(a) requires “proper exhaustion” of available administrative remedies.
Woodford v. Ngo, 548 U.S. 81, 93 (2006). Proper exhaustion requires the incarcerated person to
use all steps of the administrative process and comply with “deadlines and other critical procedural
rules.” *Id.* at 90. Even when the incarcerated person seeks relief not available in grievance
proceedings, exhaustion is a prerequisite to suit. *Booth*, 532 U.S. at 741. If an incarcerated
person’s grievance does not comply with a procedural rule but prison officials decide it on the
merits anyway at all available levels of administrative review, it is exhausted. *Reyes v. Smith*, 810
F.3d 654, 656, 658 (9th Cir. 2016) (plaintiff’s claim exhausted as to prison doctors named in
federal action where grievance plainly put prison officials on notice of nature of wrong alleged in
federal action – denial of pain medication by defendant doctors – and prison officials easily
identified named prison doctors’ involvement in alleged wrong); *Wilkerson v. Wheeler*, 772 F.3d

1 834, 840 (9th Cir. 2014) (claim properly exhausted where inmate described nature of wrong and
2 identified defendant as responding officer who deliberately applied pressure to inmate’s ankle to
3 inflict pain).

4 Compliance with prison grievance procedures is all that is required by the PLRA to
5 “properly exhaust.” *Jones v. Bock*, 549 U.S. 199, 217-18 (2007). The level of detail necessary in
6 a grievance to comply with the grievance procedures will vary from system to system and claim to
7 claim, but it is the prison’s requirements, and not the PLRA, that define the boundaries of proper
8 exhaustion. *Id.* at 218. Where a prison’s grievance procedures do not specify the level of factual
9 specificity required in the grievance, ““a grievance suffices if it alerts the prison to the nature of
10 the wrong for which redress is sought.”” *Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009)
11 (quoting *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)). The grievance need not include
12 legal terminology or legal theories unless they are necessary to provide notice of the harm being
13 grieved. *Id.* Nor must a grievance include every fact necessary to prove each element of an
14 eventual legal claim. *Id.* The purpose of a grievance is to alert the prison to a problem and
15 facilitate its resolution, not to lay groundwork for litigation. *Id.* The grievance should include
16 sufficient information “to allow prison officials to take appropriate responsive measures.”
17 *Id.* (citation and internal quotation omitted) (no exhaustion where grievance complaining of upper
18 bunk assignment failed to allege, as complaint did, that nurse had ordered lower bunk but officials
19 disregarded that order).

20 There is an exception to the mandatory exhaustion requirement, namely, the unavailability
21 of administrative remedies. *Ross v. Blake*, 578 U.S. 632, 642 (2016) (“An inmate must exhaust
22 available remedies, but need not exhaust unavailable ones.”) (quoting 42 U.S.C. § 1997(e)(a)).
23 There are “three kinds of circumstances in which an administrative remedy, although officially on
24 the books, is not capable of use to obtain relief.” *Ross*, 578 at 643. First, an administrative
25 procedure is unavailable when “it operates as a simple dead end—with officers unable or
26 consistently unwilling to provide any relief to aggrieved inmates.” *Id.* Second, “an administrative
27 scheme might be so opaque that it becomes, practically speaking, incapable of use. In this
28 situation, some mechanism exists to provide relief, but no ordinary prisoner can discern or

1 navigate it.” *Id.* at 643-44. Third, an administrative remedy is unavailable when “prison
2 administrators thwart inmates from taking advantage of a grievance process through machination,
3 misrepresentation, or intimidation.” *Id.* at 643.

4 Failure to exhaust under the PLRA is an affirmative defense that the defendant must plead
5 and prove. *Jones*, 549 U.S. at 216. The defendant’s burden is to prove that there was an available
6 administrative remedy, and that the prisoner did not exhaust that available administrative remedy.
7 *Albino v. Baca*, 747 F.3d 1162, 1172 (9th Cir. 2014), abrogated in part on other grounds by *Perttu*
8 *v. Richards*, 605 U.S. 460, 475 (2025). Once the defendant has carried that burden, the burden
9 shifts to the incarcerated person to come forward with evidence showing that there is something in
10 his particular case that made the existing and generally available administrative remedies
11 effectively unavailable to him. *Id.* That is, the burden shifts to the incarcerated person to come
12 forward with evidence showing that there is something in his particular case that made the existing
13 and generally available administrative remedies effectively unavailable to him. *Id.* The ultimate
14 burden of proof remains with the defendant. *Id.* If undisputed evidence viewed in the light most
15 favorable to the incarcerated person shows a failure to exhaust, a defendant is entitled to summary
16 judgment under Fed. R. Civ. P. 56. *Id.* at 1166. But if material facts are disputed, summary
17 judgment should be denied, and the district judge rather than a jury should determine the facts in a
18 preliminary proceeding. *Id.* Defendants generally should raise the defense in a motion for
19 summary judgment pursuant to Rule 56, and then produce evidence proving a plaintiff’s failure to
20 exhaust. *Albino*, 747 F.3d at 1166. However, “[i]n the rare event that a failure to exhaust is clear
21 on the face of the complaint, a defendant may move for dismissal under Rule 12(b)(6).” *Id.*

22 When an exhaustion claim shares common factual issues with the merits of the claims or
23 defenses, and these issues would be subject to the Seventh Amendment right to a jury trial, then
24 the jury must be given the opportunity to decide the issues of fact raised in the exhaustion claim.
25 *Perttu*, 605 U.S. at 471-72, 479. Generally speaking, trial courts resolve equitable claims and
26 juries resolve legal claims, but judges may not resolve equitable claims first if doing so could
27 prevent legal claims from getting to the jury. *Id.* at 471-72. The trial court’s discretion in
28 deciding whether the legal issue or the equitable issue should be decided first is “very narrowly

1 limited and must, wherever possible, be exercised to preserve jury trial.” *Id* at 472.

2 **D. Analysis**

3 Defendants have filed a motion for judgment on the pleadings. Dkt. No. 29. Plaintiff has
4 filed an opposition, Dkt. No. 31; and Defendants have filed a reply, Dkt. No. 32.

5 Defendants argue that they are entitled to judgment on the pleadings because, from the face
6 of the operative complaint and judicially noticeable documents, it is clear that (1) administrative
7 remedies were available to Plaintiff for his Eighth Amendment claim that Defendants were
8 deliberately indifferent to his safety when they housed inmate Bankhead in Plaintiff’s cell; and
9 (2) Plaintiff did not exhaust these remedies. In the operative complaint, Plaintiff identifies
10 Grievance No. 144510 as exhausting his administrative remedies. Dkt. No. 20 at 2. Defendants
11 argue that this grievance does not exhaust the Eighth Amendment claim raised in this action
12 because this grievance was filed prior to the events that gave rise to Plaintiff’s Eighth Amendment
13 claim, concerns a June 30, 2021 classification committee hearing that recommended his transfer to
14 CTF, does not raise the cellmate attack or safety issues raised in this action, and does not identify
15 or concern the named defendants. *See generally* Dkt. No. 29 at 8-9. Plaintiff opposes the motion
16 for judgment on the pleadings, arguing that Defendants have filed a waiver of reply and request
17 for jury trial pursuant to 42 U.S.C. § 1997e(g); and that the Court issued an order of service on
18 March 3, 2025, which allowed the parties to conduct discovery and set a dispositive motion
19 deadline. *See generally* Dkt. No. 31.

20 The Court GRANTS Defendants’ motion for judgment on the pleadings. This case
21 presents the “rare event” where the failure to exhaust is clear on the face of the operative
22 complaint and from judicially noticeable documents. *Albino*, 747 F.3d at 1166 (“In the rare event
23 that a failure to exhaust is clear on the face of the complaint, a defendant may move for dismissal
24 under Rule 12(b)(6)”). Grievance No. 144510 does not, and cannot, exhaust Plaintiff’s Eighth
25 Amendment claim regarding the October 4, 2021 decision to place inmate Bankhead in Plaintiff’s
26 cell because that grievance was filed prior to the decision regarding Bankhead. Grievance No.
27 144510 was submitted on July 25, 2021, two months prior to the October 4, 2021 decision. In
28 addition, the subject matter of Grievance No. 144510 is distinct from the Eighth Amendment

1 claim raised herein. Grievance No. 144510 concerns a June 30, 2021 UCC housing
2 recommendation that Plaintiff be transferred to Correctional Training Facility Level II, whereas
3 this action concerns the October 2021 decision to place inmate Bankhead in Plaintiff's cell.
4 Plaintiff does not dispute that administrative remedies were available to him, or that Grievance
5 No. 144510 does not raise, much less exhaust, the Eighth Amendment claim alleged in this action.
6 In addition, the factual issues relevant to the exhaustion issue (whether Grievance No. 144510,
7 submitted on or about July 25, 2021, grieves the October 4, 2021 placement of inmate Bankhead
8 in his cell, and whether administrative remedies were available to him during the relevant time
9 period) are not intertwined with the factual issues relevant to the Eighth Amendment claim
10 (whether Defendants placed inmate Bankhead in Plaintiff's cell, knowing that the placement
11 exposed Plaintiff to a substantial risk of serious harm).

12 Plaintiff's arguments in his opposition misunderstand the waiver of reply and the Court's
13 screening and scheduling order. A waiver of reply does not waive the affirmative defense of a
14 failure to exhaust administrative remedies. 42 U.S.C. § 1997e(g) provides that in cases governed
15 by the PLRA, a defendant may file a waiver of reply in lieu of an answer, and that such waiver
16 does not constitute an admission of the allegations contained in the complaint. 42 U.S.C. §
17 1997e(g); *Jones*, 549 U.S. at 213-14 (“unlike in the typical civil case, defendants do not have to
18 respond to a complaint covered by the PLRA until required to do so by the court, and waiving the
19 right to reply does not constitute an admission of the allegations in the complaint”). The Court's
20 screening order finding that the operative complaint stated a cognizable legal claim and setting a
21 briefing schedule did not preclude a motion for judgment on the pleadings or a motion raising
22 exhaustion of affirmative remedies.

23 Accordingly, for the reasons set forth above, the Court DISMISSES the operative
24 complaint for failure to exhaust administrative remedies.

25 **II. Request to Stay Discovery and File Third Amended Complaint**

26 The Court DENIES as moot Defendants' request to stay merits-based discovery pending
27 an order on the motion for judgment on the pleadings. Dkt. No. 30.

28 Plaintiff has requested that the Court allow him to file a third amended complaint. Dkt.

1 No. 31 at 2. This request was not accompanied by a proposed third amended complaint, as
2 required by N.D. Cal. L.R. 10-1. N.D. Cal. L.R. 10-1 (“Any party filing or moving to file an
3 amended pleading must reproduce the entire proposed pleading and may not incorporate any part
4 of a prior pleading by reference.”). In addition, it is unclear how a third amended complaint could
5 cure the exhaustion issue. *See McKinney v. Carey*, 311 F.3d 1198, 1199 (9th Cir. 2002) (action
6 must be dismissed unless prisoner exhausted available administrative remedies before he filed
7 suit); *see also Vaden v. Summerhill*, 449 F.3d 1047, 1051 (9th Cir. 2006) (where administrative
8 remedies not exhausted before prisoner sends complaint to court, action will be dismissed even if
9 exhaustion is completed by time complaint actually is filed by clerk). The Court DENIES
10 Plaintiff’s request for leave to file a third amended complaint without prejudice to Plaintiff re-
11 filing this request and attaching the required proposed third amended complaint.

12 Any renewed request for leave to file a third amended complaint must be filed within
13 **twenty-eight (28) days** from the date of this order. If the Court does not receive a request for
14 leave to file a third amended complaint within the deadline provided, the Court will dismiss this
15 action without further notice to Plaintiff for lack of an operative complaint.

16 CONCLUSION

17 For the reasons set forth below, the Court ORDERS as follows.

18 1. The Court GRANTS Defendants’ motion for judgment on the pleadings, Dkt. No.
19 29; and GRANTS Defendants’ related request for judicial notice, Dkt. No. 29-1.

20 2. The Court DENIES as moot Defendants’ request to stay merits-based discovery
21 pending an order on the motion for judgment on the pleadings. Dkt. No. 30.

22 3. The Court DENIES Plaintiff’s request for leave to file a third amended complaint.
23 Dkt. No. 31 at 2. This denial is without prejudice to Plaintiff re-filing this request, with a
24 proposed third amended complaint attached to the request. Any renewed request to file a third
25 amended complaint must be filed within **twenty-eight (28) days** from the date of this order. If
26 the Court does not receive a request for leave to file a third amended complaint by the deadline
27 provided, the Court will dismiss this action without further notice to Plaintiff for lack of an
28 operative complaint.

1 This order terminates Dkt. Nos. 29, 30.
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3 **IT IS SO ORDERED.**
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5 Dated: 12/3/2025
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8 HAYWOOD S. GILLIAM, JR.
9 United States District Judge
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